United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

76-4259

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

HENRY M. HALD HIGH SCHOOL ASSOCIATION,
and ROMAN CATHOLIC DIOCESE OF BROOKLYN,

Respondents.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF ON BEHALF OF RESPONDENTS HENRY M. HALD HIGH SCHOOL ASSOCIATION and ROMAN CATHOLIC DIOCESE OF BROOKLYN

CLIFTON BUDD BURKE & DeMARIA
Attorneys for Respondents
420 Lexington Avenue
New York, New York 10017
(212) 687-7410

Of Counsel:
EDWARD J. BURKE
HOWARD G. ESTOCK

(6195)

COUNSEL PRESS, INC., 55 West 42nd Street, New York, N.Y. 10036 • PE 6-8460

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Counter-Statement of the Issue

Whether substantial evidence on the record as a whole fails to support the Board's finding that Respondent violated the Act by not re-hiring Joseph Poole in the context of a general reduction of twenty persons in Respondent's teaching staff, caused by economic conditions and based upon comparative teaching abilities.

Counter-Statement of the Case

Respondent for admittedly economic reasons (Petitioner's Brief, p. 9) did not rehire twenty teachers at the end of the 1973-74 school year. The issue is whether one of those twenty, Mr. Joseph Poole, was selected because of his union activities.

1. Background

Respondent, Henry M. Hald High School Association (hereinafter "Hald"), operates a number of Catholic private secondary education schools within the boundaries of the Roman Catholic Diocese of Brooklyn (encompassing the Boroughs of Brooklyn and Queens in New York City).

At the time of the alleged unfair labor practice, Hald operated five such schools. However, since the Board's decision in this matter, three of the five schools, including the school in issue, Christ the King High Schoool, have been sold or transferred to other parties and are no longer a part of the Hald Association. 1/ Christ the King was closed by Hald and all teachers terminated on August 31, 1976.

1/ A decision was made in 1972 by the Diocese of Brooklyn to terminate its direct involvement in secondary education. To that end, seven of the original nine Hald schools have either been closed or transferred to Community Groups. The history of this development is set out in the Board case of Henry M. Hald High School Association; Roman Catholic Diocese of Brooklyn and Sisters of St. Joseph, 216 NLRB 512 (1975).

Hald was and is party to a multi-school collective bargaining agreement with the Lay Faculty Association, Local 1261, American Federation of Teachers, AFL-CIO (hereinafter the "Union"). Christ the King High School (the school at which the alleged discriminatee taught) was a member school of that bargaining unit. Hald and the Diocese have had a collective bargaining relationship with the Union since approximately 1966 when the Union was voluntarily recognized by the Respondent. The bargaining unit consists of all full-time permanent lay teachers, including Department Chairmen. At the beginning of the 1973-74 school year, the Union struck the Respondent's schools due to an inability to reach agreement over wages for the 1973-74 school year. Approximately 75 out of 104 lay teachers at Christ the King High School participated in the strike. The strike ended in November of 1973 (A. 17).

2. Relevant Contract Provisions

Out of the twenty teachers not rehired, four teachers were not rehired in the Language Department, including one French teacher, Mr. Poole.

Article XXIII of the parties' collective bargaining agreement controls layoffs and terminations. That collective bargaining agreement was General Counsel's Exhibit 3 before the Board but is not included in the Record on Appeal. Article XXIII provides, in haec verba:

"A. Each member school specifically retains the right to layoff or terminate the employment of teachers covered by this Agreement due to the elimination of teaching positions or for any other reason not in conflict with the express terms and conditions of this Agreement.

"B. Where a teaching position is eliminated, each member school specifically retains the right to be the sole determinator of which teacher is laid off or terminated, provided, however, where two or more lay teachers are employed in substantially identical teaching positions by class level, academic program and subject area in said member school, non-tenured teachers will be laid off or terminated prior to the layoff or termination of tenured teachers."

3. The Decision to Excess Twenty Teachers

The Board admits Respondent's bona fide economic justification for excessing twenty teachers from Christ the King High School in the 1974-75 school year (Tr. 71; Petitioner's Brief, p. 9, f.n. 5). Uncontradicted testimony showed that falling enrollments and an increasing financial deficit required a cutback in teacher personnel.

4. The Decision to Excess Mr. Poole

Hugh Kirwan, the Principal of Christ the King High School, testified that because of a debit of approximately $200,000 during the 1973-74 school year, the administration determined that approximately twenty teachers had to be excessed at Christ the King. Approximately four of those twenty teachers were from

the Language Department. Kirwan and Sister Ann Gray, the Department Chairman of the Language Department, testified, without contradiction, that a decision was originally reached to eliminate approximately one and a half teachers from the French Section of the Language Department (Tr. 74-78; 140). Sister Ann decided to eliminate her own teaching duties of two classes per day, which left one full teacher in the French Department to be excessed (A. 19). The three teachers in the French Department (other than Sister Ann) were Joseph Poole, Nicole Fabien and Maryann Toban. Sister Ann testified that the selection of the particular individual who was not to be rehired was a difficult one in that none of the three teachers could be considered a "bad" teacher (Tr. 142). However, Miss Toban was almost immediately eliminated from consideration, since she was also an effective Spanish teacher and, in essence, could cover two areas (A. 19; Tr. 142). (Note that Miss Toban was the Secretary-Treasurer of the Union at this time (A. 19) and had participated in the strike mentioned above). Thus, the elimination in the French Department came down to a choice between Mr. Poole and Mrs. Fabien.

The parties' collective bargaining agreement as set forth above in Point 2 does not take seniority into consideration as a factor in reductions in staff; in fact, Respondent had opposed

the Union's numerous requests to include seniority in the contract as a basis for making layoffs or terminations (Tr. 192-193). Both Mrs. Fabien and Mr. Poole were long-term employees of Christ the King and were both tenured teachers. Thus, under the terms of the contract there was no distinction between the two teachers. 2/

Hugh Kirwan and Sister Ann testified to the method by which the Respondent selected those teachers who were not to be rehired. Kirwan asked all Department Chairmen to reach a consensus with their assistants as to which teacher should be excessed in any given department as needed. That consensus was arrived at by the Department Chairmen and the Assistant Department Chairmen after evaluating the teachers through personal classroom observation, and in reviewing past evaluations if such were available.

In the Lanugage Department Sister Ann and her assistant, Miss Anania, evaluated all the language teachers and agreed that in the French Department Miss Toban and Miss Fabien should be retained (Tr. 80).

The next step in the selection process was to hold a meeting between all the Department Chairmen, the Assistant Department Chairmen, the Principal, the four Assistant Principals

2/ Mr. Poole was certified in Greek and Latin languages; however, these languages were not taught at Christ the King High School (Tr. 111).

and Deans, to discuss each department (Tr. 80). In the case of the Language Department, Sister Ann gave her opinion as to which teachers she recommended not be rehired, including her opinion that Mr. Poole should be the teacher to be excessed in the French section.

After discussion and after reviewing all the evaluations, the group consensus was that Mr. Poole should not be rehired and that Mrs. Fabien should be retained (A. 21, Tr. 130).

The Administrative Law Judge (hereinafter "ALJ") found that in the discussion of the relative merits of Poole and Mrs. Fabien as teachers of French, "There was no mention of Poole's Union membership, activities, attitudes or interests at this meeting. Neither was there any mention of Mrs. Fabien's lack of same." (A. 19).

Mr. Poole admitted that the stated reason for his non-renewal and Mrs. Fabien's retention was that "...Mrs. Fabien was a better teacher." (Tr. 32).

5. Poole's Union Activities

In the strike against Respondent at the beginning of the 1973 school year, approximately 75 of the 104 lay teachers at Christ the King High School participated. Mr. Poole was one of the strikers. Note, however, that Mr. Poole picketed at Bishop Reilly High School and not at Christ the King High School (Tr. 17).

Other teachers who also had participated in the strike were promoted at Christ the King High School: an individual teacher, Mr. Chesina, was an acknowledged striker and was promoted to Assistant Principal at the same time that Mr. Poole was laid off (Tr. 98-99). Further, as noted above, Miss Toban, who was Secretary-Treasurer of the Union was a striker and was chosen to be retained in the French section of the Language Department (Tr. 93). Another acknowledged Union activist, Mrs. Canavan, had been promoted to Assistant Principal the year before, without regard to her substantial Union activities (Tr. 93-95).

Mr. Poole's Union activities during the balance of the school year were not out of the ordinary. After the strike had been settled, Mr. Poole mentioned to Mr. Gordon, the President of the Union, that he had been assigned to substitute for absent teachers an inordinate number of times (A. 17-18; Tr. 17, 42-43). Mr. Gordon apparently treated it as a grievance. This grievance was ultimately resolved in an informal manner (Tr. 55-56; 90-92) and,in fact, Mr. Poole denied to Mr. Kirwan that he had submitted it as a grievance (Tr. 90).

The ALJ also points out (A. 18) that Poole had a discussion with Sister Mary Brown who assigned replacement duties at Christ the King. It was not shown however that Sister Mary Brown was a supervisor or had any involvement in the decision to excess teachers.

The final "grievance" which the Board relies upon is that in November, 1973 Mr. Poole mentioned to Mr. Gordon, that faculty meetings were occurring at a rate greater than that provided for in the collective bargaining agreement. Subsequently, Sister Ann asked Mr. Poole why he hadn't come to her directly ratner than going to the Union first. Sister Ann explained that her intent here was to solve matters on an amicable basis before they developed into full-scale grievances (Tr. 149-150). 3/

Poole himself testified that he forgot about the "grievances" shortly after mentioning them to Gordon (Tr. 20-21, 28).

6. The Alleged Anti-Union Animus

The foregoing facts were essentially uncontroverted and were admitted by both sides. The Board, however, attempted to show anti-union ani on the part of both the Principal, Mr. Kirwan, and Sister Ann Gray in order to establish an inference that Poole's selection was based, in part, upon his union activity. The Board based its inferences upon certain conversations, the contents of which were disputed, between Mr. Kirwan and Mr. Gordon, and between Sister Ann and Mr. Gordon.

3/ The parties' agreement (General Counsel's Exhibit 3 before the Board) provides in the "Grievance and Arbitration Procedure" (Article XXXI , § B) that:

> "It is the declared intention of the parties to make a sincere and determined effort to settle all grievances on a voluntary and informal basis. The parties to this Agreement, both on the Principal-Teacher level and on the Union-Association level are permitted and encouraged to meet and discuss informally any grievance."

Even if the Board's finding of animus has some support in the record, that animus must be shown to have affected Respondent's choice between Mr. Poole and Mrs. Fabien. It is Respondent's position, as argued in the following portion of this brief, that Poole's non-renewal was based solely upon comparative teaching abilities and that the Board has failed to sustain its burden of showing an illegal motive in making that selection.

7. Closing of the Case

As noted above, the Respondent, while protesting, complied fully with the Board's order to reinstate Mr. Poole and, subsequently, the Regional Director of Region 29 notified the Respondent that he had received suitable proof of Respondent's compliance and was closing the case (A. 32).

ARGUMENT

Point I

SUBSTANTIAL EVIDENCE DOES NOT EXIST IN THE RECORD AS A WHOLE TO SUPPORT THE BOARD'S FINDING THAT JOSEPH POOLE WAS NOT REHIRED BECAUSE OF HIS UNION OR OTHER PROTECTED ACTIVITIES.

It is important to remember the overall aspect of this case: Over 15% (twenty teachers) of the entire teaching staff was excessed due to purely economic conditions. Mr. Poole was one of the twenty. There were no allegations or proofs offered that the excessing of any of the other twenty teachers was due to improper considerations. It is fair to say that at Christ the King, which has been unionized for over 7 years, a 15% layoff was bound to include one or more activists who had "annoyed" the administration. The Board itself has recognized that it has the burden of proving that such "annoyance" overrode Respondent's comparative analysis of teaching abilities. 4/ Klate Holt Co., 161 NLRB 1606, (1966); Golden Nugget, Inc., 215 NLRB 50, (1974).

Here, however the Board has not met its burden of proof, it has made its determination upon the basis that Respondent's annoyance at Poole, if any, implied a forbidden animus and that that was sufficient to taint Poole's non-retention.

4/ The collective bargaining agreement and the parties themselves do not recognize "seniority" in the industrial sense; the only distinction between teachers in regard to longevity is that between tenured (more than 3 years) and non-tenured.

The Board's inference stops far short of demonstrating that that animus affected Respondent's choice of Poole as one of the twenty teachers to be excessed. The Board's case must fail for that reason.

The record is clear. Respondent's annoyance, if any, with Poole's activities did not rise to the level of animus. Even assuming that it did, no direct, or even circumstantial, evidence exists to show that that animus affected Respondent's evaluation of the teachers.

A. THE ADMINISTRATIVE LAW JUDGE AND THE BOARD PLACED UNDUE EMPHASIS UPON POOLE'S UNION ACTIVITIES WHICH WERE NEITHER UNUSUAL NOR DISTINCTIVE WHEN COMPARED TO THE ACTIVITIES OF OTHER UNIT EMPLOYEES.

Strike Activity

As the parties stipulated, Mr. Poole did participate in the Union's strike against Respondent but as such he was only one of approximately seventy-five lay teachers at Christ the King who did participate(Tr. 36). Further, Mr. Poole's strike activities took place at another school entirely and not at Christ the King High School (Tr. 17). There is no testimony showing that Sr. Ann had knowledge of Poole's activities or that Mr. Poole's activity was out of the ordinary when compared to the conduct of the other strikers. The Board offered no evidence to show that Union activity, or lack thereof, affected the three other teachers not rehired in the Language Department or any of the other sixteen teachers who were not rehired. It is, of course, well-settled that while Union activity cannot be a cause for dismissal, likewise such activity cannot serve to protect an employee where there exist otherwise valid grounds for discharge or layoff, NLRB v. Dixie Terminal Co., 210 F.2d 538, 540 (6th Cir. 1954), cert. den. 347 U.S. 1015 (1954); Golden Nugget, Inc., 215 NLRB 50 (1974).

The Alleged Grievances

The Board also relies upon Mr. Poole's grievance activity as support for its finding of unlawful motive. However, the record reveals that these grievances were neither major nor unusual and that, in fact, all of them were settled on an amicable basis.

The first grievance involved Mr. Poole's complaint in regard to a number of substitutions which he had been assigned (A. 17-18; Tr. 17, 42-43). Mr. Poole apparently reported this to Mr. Gordon and Mr. Gordon took it up with the Principal, Mr. Kirwan. The initial steps did not resolve the matter and the grievance proceeded to the second step of the Grievance and Arbitration Procedure. At this point the matter was settled and nothing in the record shows that it served as a "sore point" between the parties. As a matter of fact, when Mr. Kirwan discussed the matter with Mr. Poole, Mr. Poole denied having filed a grievance (Tr. 20-21, 90).

The second incident involved Mr. Poole's having "words" with Sr. Mary Brown who assigned replacement duties. This incident is an example of the type of evidence upon which the Board endeavors to sustain its inference. It is neither probative to nor indicative of anti-union animus. There is no showing that Sr. Mary Brown, who was in a clerical position, reported the discussion to anyone or that she was in a position to take any action with respect to, or to have had any effect upon Mr. Poole's employment.

The only other grievance involved Mr. Poole's bringing Mr. Gordon's attention the fact that if after-hour faculty meetings continued with the same frequency, the contractual limit would soon be exceeded. Mr. Gordon passed the complaint on to an Assistant Principal (Tr. 45). A few weeks later Sr. Ann Gray talked to Mr. Poole and asked him why he had not come to her first rather than "running to Mr. Gordon." Sr. Ann testified that her intent was to have such matters settled on an informal basis before they rose to the level of formal grievances (Tr. 149).[5/]

The foregoing is the sum and substance of Mr. Poole's protected activities. In a school of over 120 teachers such "grievances" are neither memorable nor outstanding. All these activities occurred four to six months prior to any decision to reduce staff.

The Board itself has previously refused to rely upon incidents occurring five months prior to an employee's discharge, to show employer animus. Stop & Shop, Inc. 161 NLRB 75, 79, enf'd sub. nom, Mackaby v. NLRB 377 F.2d 59 (1st Cir., 1967). The Court should not now do so.

5/ See f.n. 3, above.

B. THE UNCONTROVERTED EVIDENCE DEMONSTRATES UNION ACTIVITY DID NOT ENTER INTO THE FINAL DETERMINATION TO EXCESS MR. POOLE.

The ALJ erred in finding that Mr. Poole's union activities were considered in evaluating him or in deciding not to rehire him.

As evidenced by the ALJ's own comments, this error is due to his improper and hurried consideration of the record, based upon his mistaken belief that the Board was about to decline to assert jurisdiction over any aspect of the labor relations of a private secondary school; 6/

> "On September 23, 1974, ... the Board announced that it has under consideration 'the issuance of a rule under which it would decline to assert jurisdiction over any aspect of the labor relations of private secondary and elementary schools and preschools.' ... Consequently, it is likely that this case will ultimately be disposed of at the Board level by dismissal on jurisdictional policy grounds. With knowledge of that situation, I have decided to issue my Decision at this time in the interest of expeditious case handling rather than wait to see whether the Board does, in fact, adopt the rule it is considering.
>
> "In view of the situation, the detailed analysis of the record I would have made to explain my conclusion that the record as a whole supports a finding of discriminatory motive even without the damning remarks made to Robert Gordon by Sister Ann Gray during the last week in March of 1974 and by Hugh Kirwan on April 10, 1974, is superfluous." (Emphasis added). (A. 21).

6/ The Board did not adopt the proposed rule and continues to assert its jurisdiction over such schools.

In his haste to file his opinion, the ALJ made several errors in his evaluation of that portion of the record which he considered. For example the ALJ (at A. 15) sets forth a statement by Sr. Ann which cannot possibly be considered anti-union by any stretch of the imagination. Yet, the ALJ indicates that his finding as to credibility is based in part on the fact that Sister Ann made this "anti-union" remark and admitted others. The other statements to which the ALJ refers were made to Mr. Gordon in regard to union activities generally, during which Mr. Poole was not in any way mentioned (A. 16).

Likewise, the ALJ's crediting of Mr. Gordon over Mr. Kirwan is based on a statement in which Mr. Kirwan stated that in April he and Mr. Gordon discussed a grievance which Mr. Poole had filed in November (A. 16). If the ALJ had considered the record as a whole, he would have seen, a few pages later, that Mr. Kirwan admitted some confusion as to the dates being referred to on the initial questions (set forth at A. 16). Kirwan stated that the grievance had not been discussed since its settlement in November; he then clarified the matter (Tr. 108-9) when he stated, upon cross-examination:

> "Q. Now, I believe you stated that in the course of this meeting with Mr. Gordon, the subject of the replacement issue grievance, or the replacement issue letter, came into the conversation.
>
> Is that correct?

A. I'm sure it did somewhere along the line.

Q. Well, do you recall in what context this grievance or this letter was discussed?

A. On the -- on April the 10th?

Q. Yes.

A. Well, I would like to back it up. I don't think that came up at all on April the 10th. It was a question of whether we were going to retain Mr. Poole or not.

I had said the letters of termination had gone out.

I don't recall anything of that nature at that time.

I assume that all had been resolved.

JUDGE BLACKBURN: What do you mean by you had assumed that it had all been resolved?

THE WITNESS: I had never heard anything else about the original -- past the step when the letter was --

JUDGE BLACKBURN: Are you assuming that day?

THE WITNESS: I have heard nothing from that time regarding the discussions and replacements, so I have never seen any actual court case or anything beyond the original letter and discussions we had about it.

I thought it was resolved when the committee was established and Brother Medard gave me the ruling that we find for the teachers to see it.

I said that that's it." (Emphasis Added).

The ALJ further relied upon Gordon's testimony that Mr. Kirwan threatened him (Gordon) with denial of tenure if Mr. Gordon did not stop filing grievances. While Mr. Kirwan denied making any such threats, the ALJ found that the fact that Mr. Gordon had filed an unfair labor practice charge and was subsequently granted tenure, was dispositive of the credibility question in regard to Mr. Kirwan's relationship with Mr. Poole. The reliance upon the bare filing of a charge (which was later withdrawn without a hearing) as a determinative factor as to credibility is wholly improper. When an ALJ places the worst possible interpretation upon a mere collateral statement, this Court will not honor it NLRB v. Park Edge Sheridan Meats, Inc., 341 F.2d 725, 727 (2d Cir., 1965 . 7/

The Board's characterization of the ALJ's resolution of the conflicting testimony as "careful" (Brief of Petitioner, at page 11) is startling. It is anything but careful and, in fact, seems to be a "rush to judgment" on the part of the ALJ in order that his decision be issued prior to action by the Board changing its regulations in regard to the assertion of jurisdiction over the Respondent's schools (see A. 21).

7/ Park Edge dealt with an Employer which had previously violated the Act and then had hired labor counsel to keep itself within the law. This Court noted:

> "When a party ... has erred in the past ... it ought not be viewed as having such a propensity for sin that every episode is given the worst interpretation, or be condemned by indiscriminate repetition of the phrase that its conduct 'must be assessed against the background of its earlier unfair ... practices.'" (341 F.2d, at 727).

The Board and its ALJ are required to consider the record as a whole. Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). The ALJ's decision on its face provides ample evidence that he failed to make more than a cursory review of the testimony prior to issuing his decision.

In any event, as is argued below, there is no direct or even circumstantial evidence showing that Respondent's feelings toward Mr. Poole's activities entered into the selection of Mr. Poole for non-retention.

II. ASSUMING ARGUENDO THAT POOLE'S ACTIVITIES CREATED AN ANIMUS AGAINST HIM, THE EVIDENCE ON THE WHOLE SHOWS THAT RESPONDENT'S FINAL DETERMINATION WAS BASED UPON COMPARATIVE TEACHING ABILITY; THE BOARD'S REINSTATEMENT REMEDY IS INAPPROPRIATE.

Even assuming, arguendo, the Board has properly drawn an inference that Respondent had an animus directed at Poole, such animus does not make Poole's selection for lay-off unlawful per se. As the Board has often stated:

> "The mere fact that an employer may want to part company with an employee whose union activities have made him persona non grata does not per se establish that a subsequent discharge of that employee must be unlawfully discriminatory." P. G. Berland Paint City, Inc., 199 NLRB 927, 928 (1972).

It is established that the Board has the burden of affirmatively showing that the non-retention was improperly motivated. NLRB v. River Togs Inc., 382 F.2d 198 (2d Cir. 1967). When the Board meets that burden by utilizing inferences, the Respondent may defeat such inferences and show them to be unreasonable. Stone & Webster Corp. v. NLRB, 536 F.2d 461 (1st Cir. 1976).

In this case, even assuming, without admitting, the Board's inference to have some basis, that inference was rendered null by Sister Ann's explanation of the criteria she used for evaluating the two teachers and by Mr. Kirwan's explanation of

the process of reviewing that selection, resulting in the ultimate determination that Mrs. Fabien was the better teacher.

The Board has shown no factor upon which to base a conclusion that Poole be considered a better teacher than Mrs. Fabien. On the contrary, the record shows:

> (a) The Respondent considered Poole to be an adequate teacher (Tr. 141-142, 176) but Fabien to be better (Tr. 78-82, 141, 143, 176). This reason was admitted by Poole as the reason given to him for his layoff (Tr. 32).
>
> (b) Poole had eleven years experience; Fabien had seven; both were tenured teachers, and tenure was the only type of longevity recognized by the contract in regard to retention; Respondent has steadfastly refused to include any other type of recognition of seniority in the collective bargaining agreement
>
> (c) Poole's evaluations were adequate (A. 4) (A.6), but Mrs. Fabien's were superior (A. 2,3,8,10).
>
> (d) Poole and Fabien were both limited as to the language which they could teach at Christ the King High School (See Tr. 111).
>
> (e) Fabien's teaching fit in with Sr. Ann's philosophy that a language should be taught by use of oral expression of the language whereas Poole stressed the written form of teaching (Tr. 176-78).
>
> (f) Fabien had better rapport with her students than did Poole"(Tr. 141, 143).

In reality, what we have here is a situation in which the Board substituted its judgment for Respondent's as to which teacher is the better. The Board has neither the expertise, nor the right to do so.

> "The Act does not interfere with the normal exercise of the right of the Employer to select its employees or to discharge them.... [t]he Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion." NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45-6 (1937).

The ALJ and the Board have simply failed to consider the foregoing factors and the law applicable thereto.

Where there can be no claim that a discharge was under pretext, the test is not whether the discharge was motivated in part by the employee's union activities[8/] but rather, the test is whether substantial evidence shows that the compelling motive for the employee's choice was one of union activity. Stone & Webster Engineering Corp., v. NLRB, supra; NLRB v. Whitin Machine Works, 204 F.2d 883 (1st Cir. 1953).

On the state of this record there is no question that Respondent had a bona fide belief that Mrs. Fabien was the better of the two teachers. The ALJ found that:

> "As between the two remaining candidates -- Joseph Poole and Nicol Fabien -- Sister Ann Gray decided to recommend that Poole be terminated. She presented that recommendation at a meeting of the School's Administrators, chaired by Kirwan, in late March. Kirwan accepted her recommendation

8/ The Board cites NLRB v. Advanced Business Forms, 474 F.2d, 457 (2nd Cir., 1973) and other similar cases for this proposition. As a bare statement of law, it is correct. However, those cases all dealt with pretextual discharge in union organizing situations, not apposite here.

> after a discussion of the relative merits of Poole and Mrs. Fabien as teachers of French. There was no mention of Poole's union membership, activities, attitude, or interest at this meeting. Neither was there any mention of Mrs. Fabien's lack of same (A. 19).

The ALJ further analyzed Kirwan's and Sister Ann's rationale for selecting Mrs. Fabien as a better teacher. As the ALJ noted in his conclusions, those reasons were as follows:

> "... Mrs. Fabien possessed a greater ability to communicate the culture of her language, also had a greater rapport with students ... at times, Mr. Poole had shown a certain inability to adjust to new teaching methods or to the philosophy as we were trying to propose it, and a certain lack of creativity also in the teaching of his classes, which does not say he is bad ... Mr. Poole's rapport with the students on the whole... [by 'philosophy' I mean] where the emphasis lies, which would be on oral performance of the language over and above the intake of reading and writing and translation." (A. 21).

The ALJ specifically credits Mr. Kirwan and Sister Ann's discussion of these matters in his decision:

> "I have no doubt that these thoughts were in Kirwan's and Sister Ann Gray's minds, and were the subjects discussed at the decisive meeting of the administrators." (A. 21).

Thus, the ALJ credits the express rationale that Sister Ann used as a basis for her selection. The ALJ specifically finds that there was no mention whatsoever of union or union activities at the "decisive meeting", yet he goes on to find:

> "In the face, however, of Kirwan's and Sister Ann Gray's statements to Gordon, there can be no doubt that what tipped a closely-balanced scale in Mrs. Fabien's direction was the fact Kirwan and Sister Ann Gray viewed Poole as an agitator." (A. 21-22).

Here, however, the ALJ has erred in that all the evidence on the record points to the fact that the comparison between Mr. Poole and Mrs. Fabien was not a close one. Note that the ALJ credits Mr. Kirwan's testimony as to what occurred at the decisive meeting:

> "Kirwan testified his motive for accepting Sister Ann Gray's recommendation that Joseph Poole be terminated rather than Nicol Fabien was '[t]he very strong consensus of the whole group [at the meeting of the schools administrators at which the decision was made], which is one of the ways that I would deal with such a problem, the department chairmen, assistant chairmen were involved, and all of the administrators, the agreement was, in the end, that Mrs. Nicol Fabien was the better of the two teachers 'because of'[h]er rapport with the students, her approach to teaching, just in general that she was a better teacher than Mr. Poole, not that Mr. Poole was a poor teacher.'" (A. 21) (Emphasis added).

It appears that both the ALJ and the Board have misconceived upon whom the burden of proof rests in this case. The Board has the burden of showing that a discharge was improperly motivated. NLRB v. River Togs, Inc., 382 F.2d 198, (2d Cir. 1967); Stone & Webster Engineering Corp. v. NLRB, supra. Where, as here, the Employer has uncontested justification for making

reductions in staff and where the declared motive for selection of an employee based upon comparative abilities is supported by corroborated, uncontested testimony and by documentary evidence, then the Board must make a clear showing that the dominant motive was not the comparative teaching abilities, but was improper animus. NLRB v. Fibers International Corp., 439 F.2d 1311 (1st Cir. 1971), [9] and cases cited therein. Here, however, the Board has required that Respondent refute the assertion that its alleged animus was responsible for the selection of Mr. Poole, rather than Mrs. Fabien. In doing so the Board has endeavored to transfer the burden of proof in an § 8(a)(3) case; this it is not permitted to do.

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9 / The 1st Circuit harmonized the various circuits expression of this test in denying the Board's Petition for rehearing: "In support of its petition the Board cites some fifteen cases, listing them by circuit. While none states that the improper motive must be 'dominant', we consider the language of several to be indistinguishable. NLRB v. Milco, Inc., 2 Cir., 1968, 388 F.2d 133, 138, 67 LRRM 2202 ('the true reason');

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With regard to our use of the word 'clear' we do not mean,as the Board fears, that its burden of proof on this issue is any greater than it is on any other. However, our experience has been that from time to time the Board not only forgets that 'partially motivated' means effectively motivated, but forgets that an aura of even strong union animus is not sufficient in itself, once an adequate and proper business reason has been established. While of course an employer who has good cause to apply a particular sanction may in fact do so for an impermissible reason, in such circumstances the Board must have an affirmative basis for believing that the employer rejected the good reason and chose the bad. It is not enough, as in the case at bar, to ignore or denigrate the business reason, or to substitute speculation in its place." 439 F.2d (Petition for Rehearing unofficially reported at 76 LRRM (1st Cir. 1971).

It seems beyond argument that if one employee out of two must be laid off, and a clinical expert evaluation by the employer satisfies it that employee "A" is the better employee, a mere showing that employee "B"'s union activity had been a source of annoyance to the employer does not require that the employer retain employee "B", and now discharge the superior teacher, "A".

> "... even if we were prepared to find that Respondent was seeking an opportunity to terminate [the employee] because of its annoyance with the way in which he engaged in protected activity, we would not, in this case, find that Respondent discriminatorily discharge him. The mere fact that an employer may desire to terminate an employee because he engages in unwelcome concerted activities does not, of itself, establish the unlawfulness of a subsequent discharge. If an employee provides an employer with a sufficient cause for his dismissal by engaging in conduct for which he would have been terminated in any event, and the employer discharges him for that reason, the circumstance that the employer welcomed the opportunity to discharge does not make it discriminatory and therefore unlawful." Klate Holt Co., 161 NLRB 1606 (1966). (Emphasis added).

Yet, here the Board suggests that Mrs. Fabien should have been selected for layoff on the theory that, regardless of teaching abilities, Mr. Poole's union activities may have been on Mr. Kirwan's and Sr. Ann's mindsat some point and the Act requires that Mr. Poole be held harmless from discharge. This is obviously not the law, and not what the Act requires. 10/

10/ The suggestion, itself, is probably illegal. Mr. Gordon's request to Mr. Kirwan that Mrs. Fabien, a non-union member, be laid off rather than Mr. Poole, a union member, seems to be a classic case of discrimination by a union leader against a non-union employee, a violation of Section 8(b)(2) of the Act. If Respondent had followed that suggestion it would have laid itself open for an § 8(a)(3) charge from Mrs. Fabien, since Mrs. Fabien's evaluation showed her to be a superior teacher in the Department.

Note that the consequences pointed out by Judge Timbers in NLRB v. Advanced Business Forms, Inc., 474 F.2d 457, 465 11/ f.n. 15 (2nd Cir. 1973) (effect upon the pretextually discharged employee and effect of discouraging other employees from supporting Union) are absent here: one or the other of the teachers under consideration had to be excessed. The non-retention of Mr. Poole is unlikely to cause other employees to be discouraged from supporting the Union, since the Union has been recognized at Hald schools since 1966; the teachers' support of the Union was amply exhibited in the strike in September of 1973 (A. 17). If Respondent's motive had been to discourage union support, then the obvious first choice for lay-off in the French Section would have been Mary Ann Toban, a Union officer and a participant in the strike. Yet Miss Toban was the first person eliminated from consideration by Respondent due to her teaching abilities.

Where the need for a reduction is assumed, where a selection must be made between two persons and where the evidence shows that the teacher who is retained was a strongly superior teacher, the Board is unjustified in requiring reinstatement with back pay, as it did here.

11/ "15. The consequences to an employee of being discharged under the pretext of poor work performance are too serious to allow the discharge to stand when an improper motive entered into the employer's decision to discharge. Moreover, other employees -- particularly those barely holding their jobs -- are likely to be discouraged from supporting a union if they reasonably believe that it will cost them their jobs." 474 F.2d at 465, f.n. 15.

Section 10(c) of the Act[12/] allows the Board, in its discretion, to require reinstatement of an employee. Here, the possible presence of some animus does not alter the fact that Mrs. Fabien was a better teacher. For the Board to require reinstatement means that Respondent, in order to meet its financial constraints, had to lay-off the better of the two teachers. Such an order is an abuse of the Board's discretion. Nothing in the Act or in equity requires this remedy.

12/ Section 10(c) of the Act provides in pertinent part:
"If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in any such unfair labor practice, the Board shall issue . . . an order [requiring the taking of] such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. . . ."

Conclusion

For the reasons set forth above and upon the record as a whole this Court should find that Respondent excessed Joseph Poole solely upon the basis of comparative teaching abilities and that the Board's order is not supported by substantial evidence. The Board's Petition for Enforcement of its order should be denied.

Respectfully submitted

CLIFTON BUDD BURKE & DeMARIA
Attorneys for Respondent
Henry H. Hald High School Association
and
Roman Catholic Diocese of Brooklyn
420 Lexington Avenue
New York, New York

Of Counsel:

Howard G. Estock
Edward J. Burke

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

HENRY M. HALD HIGH SCHOOL ASSOCIATION, and ROMAN CATHOLIC DIOCESE OF BROOKLYN,

Respondent.

CERTIFICATE OF SERVICE

No. 76-4259

The undersigned certifies that three (3) copies of Respondent's brief in the above-captioned case have this day been served by first class mail upon the following counsel at the addresses listed below:

Elliott Moore,
Deputy Associate General Counsel
National Labor Relations Board
Washington, D. C.

Howard G. Estock, Esq.
Clifton Budd Burke & DeMaria
Attorneys for Respondent
420 Lexington Avenue
New York, N.Y. 10017

Dated at New York, N.Y.

this 25th day of March, 1977.